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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. —

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

JOHN H. THERRELL, ALSO KNOWN AS J. H. THERRELL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of Guy T. Helvering, Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above cause on March 9, 1937, reversing the decision of the United States Board of Tax Appeals.

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 49–52) is a memorandum opinion which is not reported. The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported in 88 F. (2d) 869.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 9, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether amounts received by the respondent as compensation for services as liquidator of certain State banks, paid entirely out of funds of the banks, are immune from Federal taxation.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations will be found in the Appendix, *infra,* pp. 8–14.

STATEMENT

The facts in this case as alleged and admitted and as stated in the opinion of the Board of Tax Appeals (R. 49–52) may be summarized as follows: In July 1930 the respondent was appointed by the Comptroller of the State of Florida as liquidator of the Bank of Bay Biscayne, a State banking institution of the State of Florida located at Miami, Florida. Later he was appointed liquidator for other banking institutions. (R. 5–6, 48, 49–50.) The appointment of liquidators to administer insolvent banking institutions by the Comptroller of the State is authorized by the Laws of Florida, Section 19, Chapter 13576 (1929), or 4162

Revised General Statutes, 6102 Compiled General Laws. (R. 50.)

The respondent, in assuming his duties as liquidator, received no commission from the Governor of the State and took no oath of office. He was appointed by and served entirely at the pleasure of the Comptroller. He was required to give bonds in each of the undertakings. R. 50.)

As liquidator, the respondent's duties were to handle litigation involving the liquidating banks and to dispose of their assets to the best advantage of the depositors and others concerned. He exercised supervision over a number of persons employed in various capacities to assist in the liquidation of the several banks, and was himself under the supervision of the Comptroller. He devoted all of his time to his duties of liquidator in both the years 1931 and 1932 except on occasions when he attended directors' meetings of a bank at Ocala, Florida, of which he was still president in an inactive status. The bank at Ocala paid the cost of his transportation to and from directors' meetings. (R. 50.)

The amount of the respondent's compensation for services in liquidating the several institutions was fixed by the Comptroller on a commission basis not in excess of five percent of the amounts collected by him and turned over to the State, and was paid out of the moneys recovered by him in the liquidation of the various banking institutions. His total compensation amounted to $8,555.61 in

1931 and $39,448.07 in 1932. (R. 50–51.) The respondent, contending that the amounts were received as an employee or officer of the State of Florida, claimed exemption from Federal income tax thereon. The Commissioner of Internal Revenue held that the compensation was taxable income and the respondent appealed to the United States Board of Tax Appeals. The Board of Tax Appeals sustained the Commissioner. From such action the respondent sought review by the United States Circuit Court of Appeals for the Fifth Circuit. That court reversed the decision of the Board of Tax Appeals, one judge dissenting.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the compensation received by the respondent as liquidator was not subject to Federal income taxation.

2. In failing to hold that the respondent was neither an officer, an employee, nor an agent of the State engaged in an essential governmental function.

3. In failing to hold that, even if the respondent were an officer, an employee, or an agent of the State, taxation of the compensation received by him out of funds of the insolvent banks imposes no prohibited burden upon the State.

REASONS FOR GRANTING THE WRIT

1. The decision in the instant case is in direct conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *McLoughlin* v.

Commissioner, decided May 3, 1937, not yet reported but found in 1937 C. C. H., Vol. 4, page 9907, affirming 34 B. T. A. 963, and in substantial conflict with *Miller* v. *McCaughn,* 27 F. (2d) 128 (C. C. A. 3d). In the *McLoughlin* case, *supra,* the State of New York engaged the services of an attorney to assist in the liquidation of insurance companies. The compensation for the services rendered in that case was, as here, paid out of funds of the companies liquidated. The court held that the rule of immunity had no application in that case because no burden was imposed upon the State. In that case the court, speaking of the present case, said:

> Any distinction between the Therrell decision and the case at bar is tenuous but, with all respect, we feel obliged to differ with the decision of the majority.

In the case of *Miller* v. *McCaughn, supra,* it was held that the rule of immunity did not apply to preclude income tax upon compensation paid to an examiner, appointed by a State court, out of funds paid to the clerk of the court by surety companies upon whose financial resources the examiner reported.

The precise question here has never been passed upon by this Court, but in numerous cases not involving officers or employees of a State or of a political subdivision thereof this Court has held that the rule of immunity did not apply unless it was established that the Federal tax involved im-

posed a real and substantial burden upon the State. *Willcuts* v. *Bunn*, 282 U. S. 216; *Group No. 1 Oil Corp.* v. *Bass*, 283 U. S. 279; *Educational Films Corp.* v. *Ward*, 282 U. S. 379; *Fox Film Corp.* v. *Doyal*, 286 U. S. 123; *Burnet* v. *A. T. Jergins Trust*, 288 U. S. 508; *Trinityfarm Co.* v. *Grosjean*, 291 U. S. 466. See also *Snyder* v. *Bettman*, 190 U. S. 249; *Greiner* v. *Lewellyn*, 258 U. S. 384; *South Carolina* v. *United States*, 199 U. S. 437; *Ohio* v. *Helvering*, 292 U. S. 360; *Helvering* v. *Powers*, 293 U. S. 214.

The court below gave no weight to the fact that the compensation was paid out of funds which were not State funds and which would not otherwise inure to the State.

2. The question in this case is of current administrative importance. In six other cases decided by the Board of Tax Appeals[1] the rule of immunity has been held not to apply under facts similar to those in the instant case involving the liquidation of banks or insurance companies. In *Saxe* v. *Anderson*, decided by the District Court for the Southern District of New York on March 26, 1937, not yet reported but found in 1937 C. C. H., Vol. 4,

[1] *Davie* v. *Commissioner*, 26 B. T. A. 1007; *Spangler* v. *Commissioner*, B. T. A. Docket No. 46386, decided by memorandum opinion April 5, 1933; *Robeerts* v. *Commissioner*, B. T. A. Docket No. 74214, decided by memorandum opinion October 31, 1934; *McLoughlin* v. *Commissioner*, 34 B. T. A. 963, affirmed by the Circuit Court of Appeals for the Second Circuit, *supra*; *Freedman* v. *Commissioner*, 34 B. T. A. 956, and *Hanrahan* v. *Commissioner*, B. T. A. Docket No. 83071, decided by memorandum opinion November 12, 1936.

p. 9684, the same principle was applied. The question is now pending before the Circuit Court of Appeals for the Third Circuit in the case of *Freedman* v. *Commissioner*, 34 B. T. A. 956, and in the Circuit Court of Appeals for the Sixth Circuit in the case of *Hanrahan* v. *Commissioner*, B. T. A. Docket No. 84071, decided by memorandum opinion November 12, 1936. A related question is now pending before the Circuit Court of Appeals for the Second Circuit in the case of *Harman* v. *Commissioner*, argued before and submitted to that court on May 20, 1937.

3. On June 1, 1937, the Court assigned for reargument the cases of *James* v. *Dravo Contracting Co.*, No. 625, October Term, 1936; *Silas Mason Co.* v. *Tax Commissioner*, No. 773, October Term, 1936, and *Ryan* v. *State of Washington*, No. 774, October Term, 1936, and requested the Attorney General to present the views of the Government upon the question, *inter alia*, of whether the State taxes impose a burden upon the Government. The question here presented is closely related and the pendency of those cases is an added reason for granting the writ here.

CONCLUSION

It is in the public interest that the conflict here presented be resolved by an authoritative decision. Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

JUNE 1937.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

> SEC. 22. GROSS INCOME.
>
> (a) General definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.
>
> * * * * *

Revenue Act of 1932, c. 209, 47 Stat. 169:

> [Sec. 22 (a), insofar as here pertinent, is substantially the same as Sec. 22 (a) above quoted.]

General Laws of Florida (1929), Vol. 1, ch. 13576:

> SECTION 19. That Section 4162 of the Revised General Statutes of the State of Florida be amended so as to read as follows:
>
> SECTION 4162. COMPTROLLER MAY APPOINT LIQUIDATOR; DUTIES OF LIQUIDATOR; NOTICE TO BANK OFFICERS; CONFIRMING APPOINTMENT. On becoming satisfied, from the reports furnished to him by a State Bank Examiner, or upon other satisfactory evidence thereof, that any bank, banking firm, banker, banking or trust company, or corporation

doing business in this State under the State laws, has become insolvent and is in default, or that the affairs of any bank, banker, banking firm or trust company or corporation doing business in this State, under such State laws, is in an unsound condition, or threatened with insolvency because of illegal or unsafe investments, or that its liabilities exceed its assets, or that it is transacting business without authority of law or in violation of law, or if the directors of any bank, banking or trust company, or corporation, or any banker or the management of any banking firm doing business in this State under the State laws, shall knowingly violate, or knowingly permit any of its officers, agents or servants to violate any of the provisions of law relative to such bank, bankers, banking firms, banking or trust companies, or corporations doing business in this State, the rights, privileges and franchises shall be subject to be forfeited, and the State Comptroller may in his discretion forthwith designate and appoint a liquidator to take charge of the assets and affairs of such bank, and require of him such bond and security as the Comptroller deems proper, not exceeding double the amount that may come into his hands, and such liquidator shall be subject to dismissal by the Comptroller, whenever in his judgment such dismissal is deemed necessary or advisable; when one liquidator is dismissed, another may be duly designated and appointed. Such liquidator under the direction and supervision of the Comptroller shall take possession of the books, records and assets of every description of such bank, banker, banking firm, banking and trust company, or corporation, and in his name shall sue for and collect all debts, dues and claims belonging to it, and

upon the order of a court of competent jurisdiction may sell or compound all bad or doubtful debts, and, on a like order, may sell all the real and personal property of such bank, banker, banking firm, banking and trust company, or corporation, on such terms as the court shall direct; and may, if necessary, to pay the debts of such bank, banker, banking firm, banking and trust company, or corporation, sue for and enforce the individual liability of the stockholders. Such liquidator shall pay all money received by him to the State Treasurer to be held as a special deposit for the use and benefit of the creditors, subject to the order of the Comptroller, and shall also make quarterly reports to or when called upon, to the Comptroller of all of his acts and proceedings. The Comptroller, immediately upon appointing such liquidator, shall serve notice upon the president, or upon any vice-president or cashier, or upon any director or other person having the charge or management of any such bank, banker, banking firm, banking or trust company, or corporation, informing him or them in such notice of his action in appointing such liquidator; and notifying him or them or it that he would apply on a date therein named, not to exceed ten days from the date of service of such notice, to some circuit judge having jurisdiction over the same, for an order confirming his action and the appointment of a liquidator for such banking institution and such bank, banking firm, or banking or trust company, or corporation may, at such hearing contest before such circuit judge the rightfulness and legality of such action of the Comptroller in appointing such liquidator.

SECTION 20. The Comptroller may provide for the administration of the affairs of

institutions under the above section by one general liquidator who shall be designated by the Comptroller as a General Liquidator for the administration of the affairs of several or all of the instructions in liquidation, whose compensation shall be paid by the Comptroller, to be paid in such proportions out of the assets of the institution whose affairs are being administered as the Comptroller may determine, not exceeding in the aggregate Six Thousand ($6,000.00) Dollars per annum. The Comptroller may provide for the transfer at any time to the general liquidator of the affairs of any institution for which a particular liquidator or receiver has been heretofore or shall hereafter be designated and the general liquidator shall be thereupon vested with all the rights conferred by law on such general liquidator as if he had been designated in the first instant to act as such.

SECTION 21. That Section 4164 of the Revised General Statutes of the State of Florida be amended so as to read as follows:

SECTION 4164. EXPENSES OF LIQUIDATING AGENT OR AGENTS; COMPENSATION OF LIQUIDATORS; DEPOSITION OF BANK'S FUNDS. All expenses of any liquidator shall be paid out of the assets of such bank, banker, banking firm, banking or trust company, or corporation before distribution of the proceeds thereof. The compensation of the liquidator shall be fixed by the Comptroller, and shall be based upon the amount of work actually necessary and performed, and shall in no case exceed five per cent of the cash collections. From time to time, after full provisions having first been made for the expenses of the liquidating agency, and the payment of liens for taxes and preferred claims, the Comptroller shall make ratable

dividend of the money in the hands of the State Treasurer on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and as the proceeds of the assets of such bank, banker, banking firm, banking or trust company, or corporation, are paid over to the liquidator, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, after all claims have been paid, shall be paid over to the shareholders, of such bank, banker, banking firm, banking or trust company, or corporation, or their legal representatives in proportion to the stock by them respectively held, or their interest therein as appearing.

SECTION 22. That Section 4165 of the Revised General Statutes of the State of Florida be amended so as to read as follows:

SECTION 4165. COMPTROLLER MAY PURCHASE PROPERTY TO PROTECT LIQUIDATOR'S TRUST. Whenever any liquidator, duly appointed by the Comptroller, and who shall have qualified and entered upon the discharge of his trust, shall find it in his opinion necessary to fully protect and benefit his said trust, to the extent that said trust may have in any property, real or personal, by reason of any bond, mortgage, lien, assignment, equity or other proper legal claim attaching thereto, and which said property is to be sold under execution, decree or foreclosure, or any proper order of any court of competent jurisdiction, or reclaimed or repossessed by any person having title opposed to such equity of his trust, he may certify the facts in the case, together with his opinion as to the value of the property, and the value of the equity his trust may have in same, and the amount that may be

necessary to purchase such property, to the Comptroller, and if the Comptroller shall in his judgment deem it to the best interest of the said trust, he shall be and is empowered to draw upon the funds to the credit of said trust in the hands of the State Treasurer to the amount necessary for the purchase of said property for the said trust.

Treasury Regulations 74:

ART. 56. *State contracts.*—The profit of an independent contractor from a contract with a State or political subdivision thereof must be included in gross income. * * *

ART. 643. *Compensation of State officers and employees.*—Compensation paid to its officers and employees by a State or political subdivision thereof for services rendered in connection with the exercise of an essential governmental function of the State or political subdivision, including fees received by notaries public commissioned by States, is not taxable. Compensation received for services rendered to a State or political subdivision thereof is included in gross income unless (a) the person receives such compensation as an officer or employee of a State or political subdivision, and (b) the services are rendered in connection with the exercise of an essential governmental function. The commissions of receivers appointed by State courts are subject to tax for 1928 and subsequent taxable years.

An officer is a person who occupies a position in the service of the State or political subdivision, the tenure of which is continuous and not temporary and the duties of which are established by law or regulations and not by agreement. An employee is one whose duties consist in the rendition of prescribed services and not the accomplish-

ment of specific objects, and whose services are continuous, not occasional or temporary. * * *

Treasury Regulations 77:

[Art. 56 and Art. 643 are identical with the corresponding articles of Treasury Regulations 74 quoted above.]

U. S. GOVERNMENT PRINTING OFFICE: 1937